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In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Intervenor,
v.
STATE OF NEW YORK,
Defendant.

RESPONSE OF INTERVENOR, COMMONWEALTH OF MASSACHUSETTS TO MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

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August, 1993

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INTRODUCTION

The Commonwealth of Massachusetts, by its undersigned counsel, hereby respectfully submits its response to the motion of the State of Delaware to

strike amended complaints in intervention.

Regardless of the Special Master's authority to permit amendment of the complaints in intervention, the Commonwealth of Massachusetts has requested leave to file its amended complaint with this Court and the Court should grant such leave because the amended complaint would not expand the issues in the case, would not prejudice any of the parties, and would promote the efficient and just resolution of this case.

DISCUSSION

On March 31, 1991, the Commonwealth of Massachusetts ("Massachusetts") filed a motion for leave to file complaint in intervention and complaint in

intervention. On October 5, 1992, the Supreme Court allowed Massachusetts' motion for leave to file complaint in intervention. Delaware v. New York, 113 S.Ct. 36 (1992); See Delaware v. New York, 113 S.Ct. 1550 (1993).

The Supreme Court remanded the case of Delaware v. New York, 113 S.Ct. 1550 (1993), to the Special Master, Thomas H. Jackson ("Special Master"), for further proceedings consistent with its opinion. In his Litigation Management Order No. 6, The Special Master allowed all parties leave to amend their pleadings. Litigation Management Order No. 6, p. 4 (June 8, 1993).

On June 29, 1993, Massachusetts filed a First Amended Complaint and an Introduction to First Amended Complaint. In the Introduction to First

Amended Complaint, Massachusetts requests that the Court grant it leave to file its First Amended Complaint if the Court determines that Massachusetts requires such leave. Commonwealth of Massachusetts' Introduction to First Amended Complaint. The Court should deem this request a motion for leave to file the amended complaint.

Massachusetts' First Amended Complaint clarifies and alleges with greater specificity the claims alleged in Massachusetts' complaint in intervention. See First Amended Complaint of Massachusetts (June 29, 1993) ("First Amended Complaint").

The First Amended Complaint does not add any new claims or theories that were not present in the original complaint. See Complaint of Massachusetts (filed March 31, 1991).

Massachusetts' original complaint in intervention requested relief pursuant to any remedy fashioned by the Supreme Court in the case and also asserted rights to an undetermined portion of the unclaimed distributions held by the State of New York ("New York"). Complaint of Massachusetts ¶8. See also Motion of the Commonwealth of Massachusetts for Leave to File Complaint in Intervention ¶7 (filed March 31, 1991). In its prayer for relief, Massachusetts requested a judgment against New York for unclaimed distributions to which Massachusetts was entitled but which had been previously seized by New York, plus interest. Complaint of Massachusetts ¶9.

Massachusetts' First Amended Complaint requests the same relief. First Amended Complaint of Massachusetts ¶11 (June 29, 1993). The First Amended Complaint clarifies the unclaimed distributions that are at issue by adding a definition of "unclaimed distributions" that was not present in the original complaint. First Amended Complaint ¶12. In addition, the amended complaint names two Massachusetts-incorporated brokerage firms that paid substantial amounts of unclaimed distributions to New York. First Amended Complaint ¶14.

The First Amended Complaint further specifically requests a judgment against New York for unclaimed distributions to which Massachusetts is entitled but that

have been seized by New York, plus interest at the rate of 12% (twelve percent) per annum as specified by the Massachusetts Abandoned Property Act G.L. c. 200A, §12(e). First Amended Complaint ¶16.

If leave to file Massachusetts' amended complaint is required, the Court should grant such leave. As stated in Fed. R. Civ. P. 15(a) and reiterated by this Court, leave to amend a complaint "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182 (1962). See Davis v. Liberty Mut. Ins. Co., 871 F.2d. 1134, 1136-37 (D.C. Cir. 1989) ("It is common ground that Rule 15 embodies a generally favorable policy towards amendments."). In the absence of bad faith, undue

delay, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party or futility of the amendment, the Court should allow leave to amend the complaint. Foman, 371 U.S. at 182; Foremost-McKesson Inc. v. Islamic Republic of Iran, 759 F. Supp. 855, 857 (D.D.C. 1991); See also California v. Nevada, 438 U.S. 913 (1978) (allowing motion for leave to file an amended complaint in original jurisdiction case).

In keeping with the liberal amendment standard, the District Court for the Eastern District of New York allowed a motion to amend a complaint where the plaintiff did not seek to add any new or additional claims and merely sought to plead claims with more

specificity. Technology Consortium v. Digital Communications, 757 F. Supp. 197, 199 (E.D.N.Y. 1991).

Massachusetts' First Amended Complaint was filed in good faith in order to clarify and allege in greater detail the general claims made in the original complaint and was filed only a few months after the Court allowed its motion to file a complaint in intervention. Allowing the amendment would not prejudice any party to the proceedings because it does not add any new claims or theories that were not present in the original complaint.[1/]

[1/] Discovery will proceed as it has been without any additional disruption or delay caused by the First Amended Complaint.

See Technology Consortium v. Digital Communications, 757 F. Supp. at 199.

Unlike the amended complaints filed by other Intervenors[2/], Massachusetts' First Amended Complaint states a claim under the "backup rule" enunciated in

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[2/] See Amended Complaint in Intervention of Plaintiff-Intervenor States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, Wisconsin, and the Commonwealth of Virginia (filed July 7, 1993); Amended Complaint in Intervention of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wyoming, and the Commonwealths of Kentucky and Pennsylvania (filed July 7, 1993); Amended Complaint in Intervention of the State of California (filed July 9, 1993); Amended Complaint by the District of Columbia (filed July 8, 1993); and Amended Complaint of the States of Michigan, Maryland and Nebraska (filed July 8, 1993).

Texas v. New Jersey, 379 U.S. 674 (1965) only and would not expand the scope of the proceedings before this Court.

Justice requires that leave to file the amended complaint be allowed because a more definite statement of Massachusetts' claim will facilitate the resolution of the case against New York. Therefore, even if the Court were to decide that the Special Master has exceeded the scope of his authority in allowing all parties leave to amend their complaints and that leave to file an amended complaint is required, the Court should allow Massachusetts' leave to file its amended complaint because the amended complaint raises no new claims, will not prejudice the defendant or any other party to this action, and

will provide a more definite statement of Massachusetts' claim.

CONCLUSION

Delaware's motion to strike amended complaints in intervention should be denied as to Massachusetts' amended complaint. In the alternative, the Commonwealth of Massachusetts requests that this Court allow Massachusetts' request for leave to file its amended complaint.

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